IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 127.

C. A. STARKEY, PLAINTIFF IN ERROR,

vs.

CHARLES ENGLEHARDT, DEFENDANT IN ERROR.

MOTION FOR A CONTINUANCE.

Now comes the plaintiff in the above-entitled action, by B. W. Perkins, his attorney, and here moves the Court that all the cases hereinafter mentioned, involving the same issues of law, be consolidated, and that the above-entitled action be continued to the next term thereof for the reasons following to wit:

1. That there is now pending in the circuit court of the United States for the district of Kansas, about to be appealed to this Court, an action instituted under the direction of the Attorney General of the United States, in the name and behalf of the General Government, for the purpose of securing the cancellation of the patent issued to the M., K. &

T. Railway Company, which includes the land in controversy in this case, upon which patent the defendant relies as the muniment of his title, and to properly consider and dispose of the rights of the parties and in justice to this plaintiff it is necessary that said case be consolidated with and considered at the same time this case is disposed of to save time of the Court, protect the rights of the plaintiff, to save expense of printing and litigation.

2. For the reason that the plaintiff is prosecuting his appeal in this case in good faith, but, owing to his indigent circumstances he has been unable during the time that said case has been pending in this Court without distressing him and encumbring his property to pay the expense of printing the record therein, as provided in rule 10; but he believes if the Court will grant him the extension prayed for that before the next term thereof he will be enabled to comply with the rules of the Court and thereby have his case considered on its merits and his interest in the premises protected.

3. That if said case is dismissed at the present term on account of the record not being printed, as provided in said rule 10, great hardship will result to the plaintiff on account of reasons over which he has no control, but which he believes he can protect himself against if the continuance herein prayed for is granted.

4. That during the time said case has been pending in said Court no appearance has been made therein by the defendant until quite recently, when the plaintiff appealed to defendant's counsel for a time, which was refused, and the

plaintiff believes that the defendant has now entered an appearance in the case for the purpose of oppressing and distressing said plaintiff by securing a dismissal thereof for want of compliance with said rule and taking advantage of him in his financial embarrassment to prevent the Court from passing upon the merits of the case and to deprive the plaintiff of property to which he believes he is rightfully entitled.

5. That there are now pending in this Court four cases, to wit, No. 451, N. L. Ard *vs.* Alexander Brandon; No. 452, N. L. Ard *vs.* C. H. Pratt; No. 453, Mary E. Wood *vs.* J. M. Beach; No. 454, William Maddox *vs.* Nelson B. Burnham, involving the same questions of law which are at issue in this case, which cases will not be reached until the next term of the Court, and the plaintiff therefore asks that all these cases, involving the same questions, may be consolidated and considered at the same time, that the Court may have the benefit of a full argument on all the propositions involved, which are of serious moment to the settlers on said lands and involving difficult and intricate questions of law.

6. That the plaintiff has recently secured the services of counsel to present his case to the Court, who have not yet had an opportunity to examine the case with that fullness of detail which is necessary to present a question of the magnitude involving the construction of a statute making a land grant which affects the rights of so many settlers as will be reached by a decision in this case.

7. That the plaintiff is informed and believes that his honor Justice Harlan held in the case now pending in said circuit court that the patent under which the defendant claims title from the M., K. and T. Railway Co. should be canceled, and in the interest of justice and equity the plaintiff asks the indulgence of the Court, that he may be given this chance to defend his claim to the land in controversy.

8. That the Hon. William Lawrence, of Bellefontaine, Ohio, is interested in the questions here involved, and believes that all the cases bearing upon that issue should be heard together, and so advises. As evidence thereof a letter this day received from him is herewith filed and asked to be considered. It is as follows:

BELLEFONTAINE, OHIO, *Nov.* 20, 1893.

Hon. BISHOP W. PERKINS, *Oswego, Kansas.*

DEAR SENATOR: Nov. 17 the clerk Sup. Court U. S., writes that case of C. O. Starkey *v.* Nelson Burnham, No. 126, and Starkey *v.* Englehart, No. 127, will probably be called the latter part of next week (now this week), and you are the attorney, and I presume you will be on hand to see to them or telegraph and have them delayed until you reach Washington. The clerk writes that as the record is not printed they will be dismissed under the 10th rule unless cause is shown to the contrary. You know that the Sup. C't, Justice Harlan delivering opinion, decided in case of U. S. *v.* M., K. & T. R'y Co. in favor of cancelling patents. The case then went back to circuit court, Topeka, and will again go up to Sup. Court. I think these 2 cases should *await* the coming of the case now at Topeka and *then* all be *consolidated* and heard together. I suppose you will so move the Court. The case of N. L. Ard must be in same condition. You have that case. The lands in Ard's case and in these 2 cases are included in the bill now in case at Topeka. It will require prompt attention.

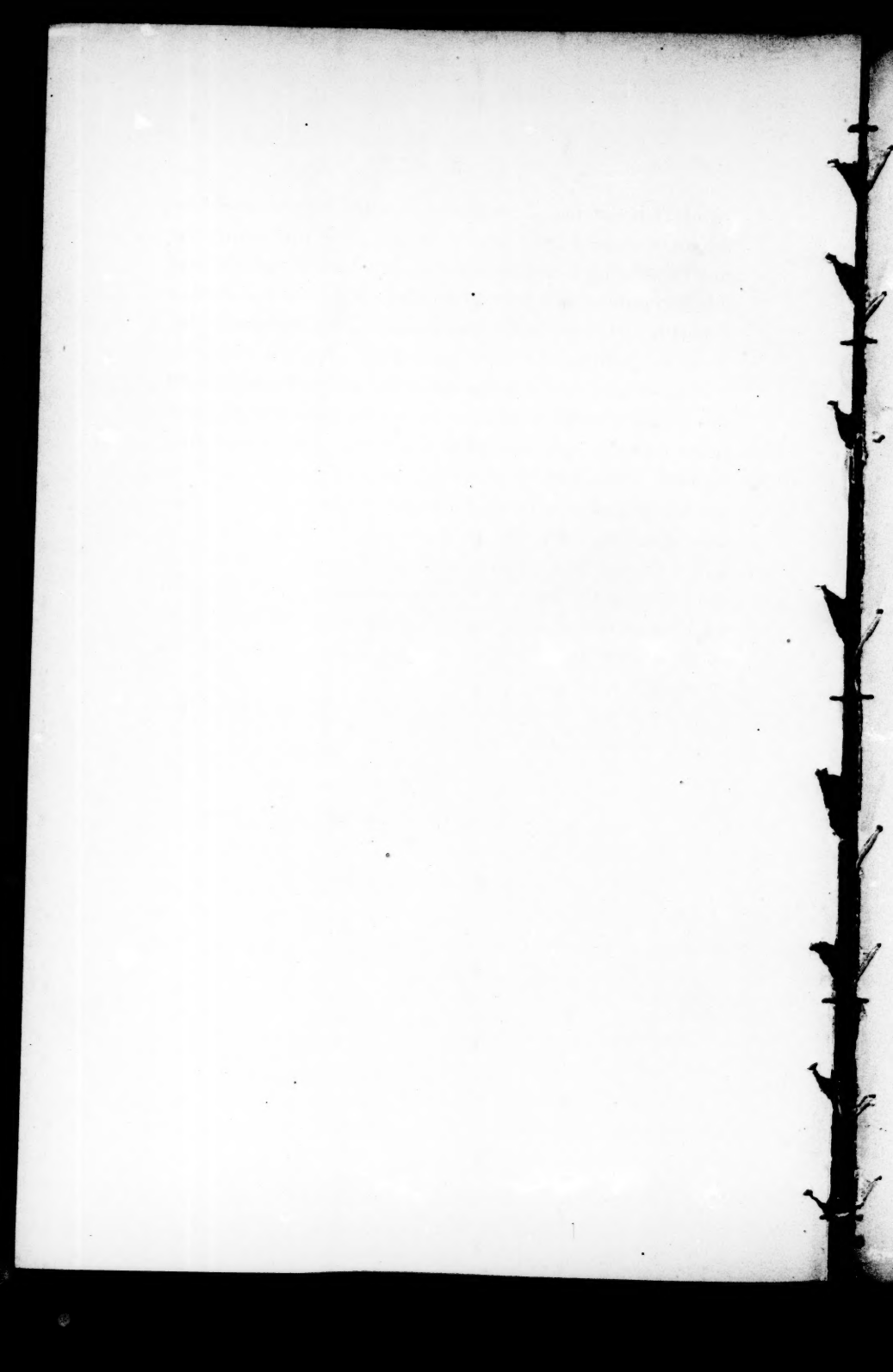
In haste, truly, &c., WM. LAWRENCE.

(9.) That the defendant cannot possibly be prejudiced by the continuance herein prayed for except by preventing the case from being heard upon its merits, and the plaintiff asks this honorable Court in its discretion to give him a further opportunity to present the questions involved and protect his home by granting the relief prayed for.

If the Court in the administration of justice believes it should not grant this motion in whole, then the plaintiff prays that this case may go to the foot of the docket, that he may, if possible, by encumbering his property raise the money necessary to comply with the rule and have his case considered on its merits by the Court. But he craves the grace thereof as a matter of merciful justice to him that this case, in the light of the circumstances surrounding it and the pendency of other cases involving the same questions of law, may be continued to the next term of this honorable Court.

If required, the plaintiff will verify the matters of fact herein set out as the Court may direct.

B. W. PERKINS,
Attorney for Plaintiff.



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v.
NELSON BURNHAM.

No. 126.

In Error to the Supreme Court of the State of Kansas.

Brief in Opposition to Motion for Continuance.

The motion should be denied—

I.

The case was docketed in this Court July 1, 1890. The record is not yet printed. Call for deposit therefor was long since made upon the counsel of record (Mr. William Lawrence), who docketed the case. When called in regular order the case is hence subject to dismissal under the peremptory requirement of Rule 10. Counsel demands continuance, or that the case be passed without terms. *Contra*, we have offered and now assent that it

be passed to the foot of the call for any reasonable date, say the second Monday of January next, to be argued, or if the record be not printed when so called, to be dismissed.

II.

The case of the United States *v.* the Missouri, Kansas, and Texas Railway Company, cited in paragraphs 1 and 7 of Counsel's motion *did not* hold the patent to said Company invalid, but on the contrary the decision referred to rendered by this Court at the October Term, 1891 (141 U. S. 358, 374), distinctly held that—

" In our judgment—omitting for the present any consid-
" eration of the rights alleged to have been acquired by
" individuals under the homestead and pre-emption laws
" in the lands in dispute, and looking at the case only as
" between the United States and the Missouri-Kansas
" Company—there is no escape from the conclusion that
" the *even*-numbered sections within the indemnity limits
" of the Leavenworth road, not being set apart by the act
" of 1863, for any specific purpose, and being also nearest
" to the granted sections within the place limits of the
" Missouri-Kansas Company, were not, by that act, re-
" served to the United States within the meaning of the
" act of 1866, and, therefore—if no rights had attached to
" them before their selection with the approval of the
" Secretary of the Interior—could not have been legally
" selected as indemnity lands for that Company."

The land in the case at bar falls within these limits. They were selected in 1873, and were approved by the Secretary in 1873. The railroad title was sold for a valuable consideration and deeded to the defendant in error in 1875. The only possible question remaining in the case is whether the plaintiff in error had other legal or equitable rights which had attached " before their selec-

" tion with the approval of the Secretary of the Interior." This record contains the full proof of the plaintiff in error upon that point, upon which he has stood in this litigation for 12 years and until the week when his case was expected to be called here for argument. He makes now no assertion as to any dissatisfaction with the sufficiency of that proof, and it has no possible relation to or dependency upon the proof as to the facts of any subsequent case now upon this docket, or to the United States case now pending in the circuit court. Since return of that case to that court the United States has abandoned its original bill and recently filed elaborate amended and supplemental bill, to which, we are to-day advised by the counsel in that case, the defendant's answer is not due until January, 1894. Trial in that court upon issues not yet framed, involving separate facts and affecting many separate parcels, will involve years of time. Upon final determination therein appeal lies thence to the United States Circuit Court of Appeals. The case may never reach this Court. Pendency of that case, therefore, it is respectfully submitted, cannot justify continuance of this case upon suggestion that years hence the Government's suit *may* reach this Court. Nor should such suit be permitted to delay this independent and individual action to the plain and irreparable prejudice of the defendant in error. Moreover, plaintiff in error has herein fully proved all facts constituting his legal and equitable defence, as under the Kansas Practice Act he may do, and *this* case presents early and full opportunity for final determination of the controversy far in advance of the suggested Government suit, which, upon the claim of counsel, and as affecting this case only, could raise precisely the same questions, upon precisely the same facts, and to reach the same result.

III.

This case stands upon separate and independent facts, having no relation to any subsequent case now upon the docket. The suit was brought by defendant in error to recover possession over twelve years ago. It involves eighty acres or land, title whereto is held by defendant in error under patent issued twenty years ago, against which plaintiff in error asserts an equitable defence based upon alleged prior settlement rights. The plaintiff in error has been in constant possession many years, enjoying the fruits thereof, whilst defendant in error (out of possession) has become financially distressed by the protracted litigation and justly seeks final determination thereof here without further postponement.

The separate cases named by counsel now upon the docket, and which cannot be reached at this term, may be advanced to be heard with these, but the consolidation asked, with postponement of these cases to await the regular call of those cited, would be unjust. They, each and all, stand upon independent facts constituting the separate equitable defences of each plaintiff in error.

IV.

We do not seek to distress plaintiff in error, as our offer in paragraph I hereof plainly shows. We were only employed in the case within the past few days, and because the financial condition of defendant in error did not permit or justify his sending counsel from Kansas upon expectation of arguing a case in which the Record had not been printed within a week from its being called. The Record here has at all times given the name of defendant in error's counsel below, who has at all times been acces-

sible. The case was docketed in this Court by Mr. William Lawrence three and one-half years ago, whose sole appearance for plaintiff in error has since stood. That gentleman is the attorney of the settlers and has for many years appeared in all cases before this Court affecting the Missouri, Kansas and Texas Railway Company's grant.

V.

We should clearly be supported by the order of this Court in insisting that the plaintiff in error, who has held us in this Court for three and one-half years, should at least be required to show by deposit of money to print his record his *bona fide* intention to argue this case at some fixed time.

Respectfully submitted.

A. T. BRITTON,

A. B. BROWNE,

Att'ys for Defendant in Error.

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A. T. BRITTON,
A. B. BROWNE,
Attorneys for Defendant in Error.

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